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No. 83-810

# In the Supreme Court of the United States

OCTOBER TERM, 1983

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the effects of his decision to cease operations.

2. Whether, in the circumstances of this case, the Board's limited back pay remedy was reasonable.

3. Whether the complaint alleged, and the Board found, the violation that the court of appeals identified.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:



Constitution and statutes:

Page

Constitution and statutes—Continued:

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 70a-94a) is reported at 709 F.2d 1138. The decision and order of the National Labor Relations Board (Pet. App. 17a-50a) is reported at 259 N.L.R.B. 819.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 69a) was entered on June 1, 1983. A petition for rehearing was denied on August 26, 1983 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on November 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Seeburg Corporation[1] and the Union[2] were parties to a collective bargaining agreement that was effective from November 1977 to September 1980 (Pet. App. 20a). On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et. seq.* (Pet. App. 42a). On February 4, 1980, petitioner Nathan Yorke was appointed by the bankruptcy court as trustee for Seeburg and assumed full control of the corporation (*id.* at 43a). Following a creditors' meeting held on February 8, in which he learned that Seeburg's liabilities exceeded its assets, petitioner applied to the bankruptcy court for authorization to terminate operations. On February 11, the bankruptcy court granted petitioner's application; later that day, petitioner closed down the plant and discharged the seven remaining employees.[3] The Union received no notice of this action. Pet. App. 43a, 24a.

On February 15, 1980, the Union wrote a letter to both petitioner and Seeburg requesting, inter alia, a meeting to discuss the decision and effects of the cessation of operations. On February 25, petitioner responded to the Union's letter, stating that as trustee he had discontinued the operation of the business and no longer employed any employees. Pet. App. 25a-26a, 43a, 73a-75a. On February 28, the Union filed unfair labor practice charges against petitioner

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[1]Seeburg Corporation and Seeburg Service Parts Co., respondents in the Board proceeding, were found by the Board to constitute a single integrated business enterprise and a single or joint employer under the Act (Pet. App. 20a). This finding was not challenged in the court of appeals. The two companies are referred to herein as "Seeburg".

[2]Warehouse, Mail Order, Office, Professional and Technical Employees Union, Local 743, International Brotherhood of Teamsters.

[3]The bulk of Seeburg's work force was laid off prior to petitioner's appointment as trustee. These layoffs were accomplished in accordance with the collective bargaining agreement. Pet. App. 22a, 42a-43a.

and Seeburg, alleging, inter alia, that petitioner had failed to bargain with the Union about the effects on employees of the decision to terminate operations (*id.* at 18a).

On April 10, 1980, petitioner and Seeburg's Chairman of the Board met with the Union and informed it that petitioner planned to recall two or three unit employees to assist Seeburg in a sale of parts the bankruptcy court had authorized. The Union agreed, and petitioner accordingly recalled three unit employees. Petitioner resumed operations with the three employees, selling parts from approximately April 10, 1980, through July 28, 1980. On the latter date, petitioner's plan of arrangement, which provided for a liquidation sale to Stern Electronics, was confirmed by the bankruptcy court, and petitioner finally terminated operations. Pet. App. 27a, 28a, 43a-44a.[4]

2. The Board, upholding the decision of the administrative law judge, found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by terminating operations without prior notice to the Union and by failing to bargain with the

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[4]At the July 28 hearing, the bankruptcy court ruled (Pet. App. 59a) that the Board's claim for back pay (see pages 4-5, *infra*) was an administrative expense entitled to first priority under the Bankruptcy Code. As of that date, the Board's proof of claim amounted to $55,000. Under the reorganization plan approved by the bankruptcy court, Seeburg and the purchaser in liquidation, Stern Electronics, agreed to set aside $49,000 of the assets for back pay in case Seeburg should ultimately be found liable. Stern Electronics agreed to provide an additional $6,000 for any back pay liability that might be assessed. Pet. App. 44a.

The bankruptcy court also enjoined the Board from processing the unfair labor practice case and directed that the unfair labor practice issue be tried instead by the bankruptcy court (Pet. App. 61a-63a). On appeal, the United States District Court for the Northern District of Illinois vacated the injunction against the Board and directed the bankruptcy court to refrain from hearing the unfair labor practice charges (*id.* at 65a-68a).

Union over the effects of its decision to terminate operations (Pet. App. 41a-50a, 17a-40a). The administrative law judge explained that a trustee in bankruptcy has a duty to comply with the Act, including the duty to bargain and that "[t]his duty is not relieved by the employer's bankruptcy, and any consequent belief * * * that it would be financially unable to meet any of the union's bargaining demands" (*id.* at 32a) (emphasis omitted).

The Board ordered the trustee to bargain, upon request by the Union, with respect to the effects on unit employees of the decision to terminate operations on February 11, 1980, to reduce to writing any agreement reached as a result of such bargaining, and to mail an appropriate notice to each unit employee (Pet. App. 38a). The Board accompanied its order to bargain with a limited back pay remedy for the seven employees who were on the payroll on February 11, 1980. The order directed petitioner to pay the wages of these employees from five days after the date of the Board's decision until (1) the parties reached agreement; (2) the parties reached impasse in bargaining; (3) the Union failed to request bargaining within five days of the Board decision; or (4) the Union failed to bargain in good faith, provided that "in no event shall the sum paid to any of these employees exceed the amount each would have earned as wages from the time [Seeburg] discontinued its operations to the time each secured equivalent employment elsewhere, or the date on which [Seeburg] shall have offered to bargain, whichever occurs first; provided, however, in no event shall this sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in [Seeburg's] employ" (Pet. App. 46a-47a). The Board explained (*id.* at 46a) that a bargaining order alone could not fully remedy the unfair labor practices because Seeburg's employees "were denied an opportunity to bargain through their exclusive representative at a time when

such bargaining would have been meaningful. Meaningful bargaining cannot now be assured until some measure of economic strength is restored to the Union." The Board stated (*ibid.*) that the back pay it ordered was designed to make the seven employees whole "for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for [Seeburg]."

3. The court of appeals (Coffey, J., dissenting) upheld the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the effects of the decision to terminate operations (Pet. App. 70a-94a).[5] The court stated that a "Trustee in Bankruptcy, like any other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code" (*id.* at 76a). The court concluded that recognition of a duty to bargain would not unduly impede a trustee's discharge of his reponsibilities under the Bankruptcy Code (Pet. App. 77a). Moreover, "[s]ince the obligation to bargain arises only with the Trustee's decision to terminate operations in the overall interests of the creditors, the costs concomitant with that decision properly can be attributed to the Trustee's efforts to 'preserve the estate' on the creditors' behalf" (*id.* at 77a-78a). The court concluded that "[w]hile the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining" (*id.* at 78a).

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[5]The court of appeals disagreed with the Board's conclusion that petitioner violated Section 8(a)(5) and (1) of the Act by failing to *notify* the Union of his decision to terminate operations. The court found that "the emergency situation with which [petitioner] was confronted excused his obligation to notify the Union before closure" (Pet. App. 78a-79a).

The court of appeals rejected petitioner's challenge to the Board's limited back pay award.[6] The court disagreed with the contention that, in the circumstances of this case, petitioner would have been unable to make concessions because Seeburg had no assets. The court explained (Pet. App. 81a):

> Although the company was bankrupt, at the time of closure it still had approximately $6,000,000 worth of unliquidated assets. Furthermore, the Company later found it necessary to recall three bargaining unit employees to help liquidate the Company. While the Trustee may have been required to obtain the bankruptcy court's authorization before granting concessions, the Trustee could have bargained subject to that approval. The Board reasonably could conclude that, had the Trustee bargained in February and March, the Union would have had some leverage in obtaining concessions. The purpose of the limited back pay requirement in such circumstances is not to punish, but to create an incentive for the Company to bargain in good faith.

The court also rejected petitioner's contention that the minimum two-week back pay award to the seven employees served no legitimate function and held that such a remedy was within the Board's discretion. The Court noted (*id.* at 82a) that "three years after the plant shutdown, the Union can hardly hope to attain the same benefits from bargaining that might have helped ease its employees' transition into a new line of work had bargaining taken place immediately

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[6]The court of appeals disagreed with the Board's conclusion that the remedial order should be computed retroactive to the date of the Board's order. It modified the Board's order so that petitioner's back pay obligation would begin on the date of the court's opinion rather than on the date of issuance of the Board's order. Pet. App. 82a-84a. The court of appeals entered a stay of its judgment until November 14, 1983, the date on which the petition for a writ of certiorari was filed.

upon closure." The court concluded that the Board had taken into account changed circumstances, that the amount of back pay the Board ordered represented a small amount in comparison to the assets Seeburg held, and that the minimum pay period might help to discourage premature impasse in the bargaining ordered by the Board (*ibid.*).

Judge Coffey dissented (Pet. App. 85a-94a). In his view, a bankruptcy trustee may not bargain with a union over the effects of a closing without first securing the permission of the bankruptcy court. Therefore, petitioner could not be said to have violated the duty to bargain about the effects of the closing because his response to the Union's bargaining demand was consistent with his obligation to obtain the permission of the bankruptcy court before entering into negotiations (id. at 89a-90a).

## ARGUMENT

1. Petitioner contends (Pet. 7) that the decision of the court of appeals conflicts with the bankruptcy laws because it requires "that the Trustee * * * yield his duties under the Bankruptcy Laws and bargain and grant to ex-employees the $55,000 in funds which remain in the estate." That contention is without merit.

Where the requirements of the National Labor Relations Act conflict with the requirements of the Bankruptcy Code, the two must be harmonized. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). But here the court of appeals found no conflict between the requirements of the Act and petitioner's duties under the Code. Indeed, every court of appeals that has considered the question has agreed that a trustee in bankruptcy, like any other employer, must abide by the Act and bargain with the exclusive bargaining representative of its employees. See *In re Bildisco*, 682 F.2d 72, 83 (3d Cir. 1982), cert. granted, Nos. 82-818 and 82-852 (Jan. 17, 1983); *Shopmen's Local Union No. 455* v. *Kevin Steel*

*Products, Inc.*, 519 F.2d 698, 704 (2d Cir. 1975); *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 894-895 (11th Cir. 1983); *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980).

The court of appeals correctly concluded that there is no inconsistency between petitioner's fiduciary obligations as trustee under the Bankruptcy Code and his duty to bargain with the Union about the effects of his termination of operations. The Act required petitioner to bargain with the Union about the effects of the closing at a time when bargaining might have been meaningful.[7] It did not require petitioner to agree to any measures that would have been in derogation of his fiduciary duties to creditors. As the court of appeals recognized (Pet. App. 78a), "[w]hile the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining."[8]

Moreover, nothing in the Board's order requires petitioner to grant economic concessions to the employees; nor did the Board fault petitioner for failing to grant economic concessions in the past. The amount of $55,000, to which

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[7]The court of appeals noted (Pet. App. 77a) that "effects" bargaining could include subjects such as severance pay, payments into a pension fund, preferential hiring at an employer's other locations, and provision of reference letters.

[8]Contrary to the suggestion in the dissent (Pet. App. 90a-91a), this case does not involve petitioner's assumption of a collective bargaining agreement. The statutory duty to bargain arises from the Union's status as the bargaining representative of the employees and does not depend on the existence of a collective bargaining agreement. Accordingly, the issue presented in *NLRB* v. *Bildisco and Bildisco, Debtor-In-Possession*, and *Local 408, International Brotherhood of Teamsters* v. *NLRB*, Nos. 82-818 and 82-852 (argued Oct. 11, 1983), concerning the standards for rejection of collective bargaining agreements in bankruptcy courts and the obligations of debtors-in-possession and trustees to adhere to such agreements, is not presented here.

petitioner refers, does not represent a sum designed to cover any bargaining concessions. Rather, it is an amount the bankruptcy court set aside after the Board, as a creditor under the Code, established its proof of claim based on petitioner's potential liability under the Act for his unlawful refusal to bargain. The bankruptcy court found (Pet. App. 59a) that the Board's claim, if proven, would be for damages for injury to employees and would be one of the "actual necessary costs and expenses of preserving the estate" within the meaning of 11 U.S.C. 503(b)(1)(A) and thus an "administrative expense" entitled to first priority under 11 U.S.C. 507(a)(1). In fact, the court of appeals' modification of the Board's order allowed petitioner to reduce his *actual* liability far below $55,000 by holding the minimum back pay to a two-week period. See Pet. App. 82a-84a.[9]

Petitioner urges (Pet. 8-9) that the dissent's suggestion that a trustee be required to obtain the permission of the bankruptcy court before entering into negotiations with the bargaining representative of the employees would better accommodate the competing demands of the Act and the

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[9]There is no merit to petitioner's contention (Pet. 6) that the court of appeals' holding conflicts with this Court's holding in *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982). *Gibbons* involved the Rock Island Transition and Employee Assistance Act, 45 U.S.C. (Supp. V) 1001 *et seq.*, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1959 *et seq.* in which Congress imposed the duty on the bankrupt, Rock Island Railroad, to provide up to $75 million in benefits to displaced employees and accorded priority over all other creditors to the employees' claims. The Court held the statute invalid on the ground that it was repugnant to Article I, § 8, Cl. 4, of the Constitution, which requires uniformity in the enactment of bankruptcy laws. The Board's order in this case does not "legislate" expenditures of money nor require payment in disregard of the bankruptcy laws. Rather, the Board's make whole order is designed to dissipate the effects of petitioner's unfair labor practices. Petitioner's potential monetary liability has been established by and through the bankruptcy court in strict conformity with bankruptcy laws. See page 3 note 4, *supra*.

Code. But the dissent's concern that the trustee not make important decisions without the bankruptcy court's approval (*id.* at 90a) is fully met by the court of appeals' requirement that the bankruptcy court approve any agreement reached by the parties. Indeed, that solution may well give the bankruptcy court greater powers of supervision over the trustee's conduct than would a mere requirement that the trustee obtain approval before engaging in negotiations.

2. Petitioner contends also (Pet. 13-14) that the Board's back pay remedy is inappropriate because the employees were rightfully terminated. That contention overlooks the fact that, in fulfilling its obligations under Section 10(c) of the Act, 29 U.S.C. 160(c),[10] the Board must ensure that its remedial order not only deters the unfair labor practice found, but also "vindicate[s] the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952) (citation omitted). In order to "mak[e] the employees whole," the Board seeks to restore the parties, to the extent practicable, to the situation that would have obtained but for the unfair labor practice. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 265 (1969); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In fact, "[t]he efficacy of the Board's remedies almost always depends upon the extent to which they can return the parties to a *status quo ante*." *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). In cases involving an employer's breach of the duty to bargain, the primary remedial goal

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[10]Section 10(c) of the Act, 29 U.S.C. 160(c), provides that the Board, upon a finding that an unfair labor practice has been committed, "shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *."

in restoring the status quo ante is to allow the union to resume bargaining in a meaningful context, without an unlawfully imposed deterioration in its bargaining position. See, *e.g.*, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 215-217 (1964).

In situations in which it is impossible or inappropriate to order reopening of a closed operation, the Board has traditionally imposed, and the courts have approved, a limited make whole order of the sort issued in this case as a remedy for an employer's refusal to bargain about the effects of the discontinuance of operations on bargaining unit employees.[11] The Board's order in this case is designed to restore, so far as practicable, the bargaining power the Union would have had if petitioner had given timely notice of his decision and afforded the Union an opportunity to bargain about the effects of the decision before it was implemented. Moreover, as the court of appeals noted (Pet. App. 81a), the Board's remedy "create[s] an incentive for [petitioner] to bargain in good faith." See *Summit Tooling Co.*, 195 N.L.R.B. 479, 481 (1972), enforced mem., 474 F.2d 1352 (7th Cir. 1973).

Petitioner errs in asserting that these principles have no application to "ex-employees of a closed, bankrupt company" (Pet. 14) "where the Trustee has only limited powers and not the power to pay 'back pay' or even 'severance pay' " (*id.* at 13). If petitioner contends that the Board's

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[11]See, *e.g.*, *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 921 (D.C. Cir. 1972); *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 258 (8th Cir. 1970); *NLRB* v. *Drapery Mfg. Co.*, 425 F.2d 1026, 1028-1029 (8th Cir. 1970); *Globe Security Services, Inc.*, 229 N.L.R.B. 460, 462-463 (1977), enforced mem., 582 F.2d 1275 (3d Cir. 1978); *Empire Dental Co.*, 211 N.L.R.B. 860, 861 (1974), enforced mem., 538 F.2d 337 (9th Cir. 1976); *Burgmeyer Bros. Inc.*, 254 N.L.R.B. 1027, 1028-1029 & n.7. (1981); *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 390 (1968).

remedy is inappropriate because the employees have already been terminated, the law is clear that such termination does not defeat the Board's ability to impose an effective remedy for the unfair labor practice where an employer has unlawfully refused to bargain about the effects of a closing. See *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681-682 (1981), and cases cited at note 11, *supra*. To the extent petitioner contends that he had no power to grant economic concessions, this contention merely restates his assertion that a trustee in bankruptcy has no obligation to bargain over the effects of a plant closing. As we have shown at pages 7-10, *supra*, that assertion is without merit.

3. Petitioner errs in contending (Pet. 10-13) that he was found guilty of a violation "neither charged, found nor litigated" (*id.* at 10).

The amended Board complaint explicitly states that petitioner terminated operations "without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct" and thereby violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 6a). The administrative law judge specifically found (*id.* at 33a; emphasis omitted) that "Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and made a written 'demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees.' " In her conclusions of law (*id.* at 35a), the administrative law judge found that petitioner terminated operations and discharged employees "without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effects of such conduct on unit employees" and that that conduct violated Section 8(a)(5) and (1) of the Act, 29

U.S.C. 158(a)(5) and (1).[12] Finally, the Board stated (Pet. App. 44a) that "the Administrative Law Judge properly found that [Seeburg] violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the effects on unit employees of its decision to terminate operations on February 11, 1980." Thus, the violation identified by the court of appeals properly rested on allegations and findings that were made at every point in the proceedings below.

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[12]Petitioner appears to read both this finding and the similar language in the complaint as referring only to his failure to give the Union *notice* of the decision to terminate operations. But the conjunction "and" adds the concurrent allegation and finding that there was a refusal "to negotiate and bargain concerning the effects [of the decision] on unit employees."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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